STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, GREATER MICHIGAN CHAPTER, a Michigan Non-Profit Corporation,

Plaintiff/Appellant,

-vs-

CITY OF LANSING,

Defendants/Appellees,

Michigan Supreme Court
149622

Lower Docket Case No.
12-000406-CZ

Court of Appeals Docket No.
313684

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REPLY BRIEF OF PLAINTIFF/APPELLANT ASSOCIATED BUILDERS AND CONTRACTORS, GREATER MICHIGAN CHAPTER, ("ABC")

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ARGUMENT

I. THE CITY OF LANSING'S FAILURE TO ADDRESS THE COURT OF APPEALS' DISREGARD OF *LENNANE* DEMONSTRATES THAT THE LOWER COURT OVERSTEPPED ITS AUTHORITY AND THAT THE CASE SHOULD BE REMANDED.

Pages 6 through 42 of the City of Lansing's Brief on Appeal, are devoted to a discussion of whether or not the Supreme Court should overrule its own prior decision in *Attorney General, ex rel. Lennane v. City of Detroit*, 225 Mich 631; 196 NW 391 (1923). It isn't until pages 42 through 45 that the City addresses the issue of "what authority, if any, enabled defendant to enact its prevailing wage ordinance." Even there, the City does not address how it was the Court of Appeals did not overstep its authority when bypassing *Lennane* in order to find the City's ordinance lawfully established. Obviously, the majority decision of the Court of Appeals has not been supported because it is not supportable. It was legally bound by *stare decisis* to follow *Lennane,* but it did not. For this reason, the decision of the lower court majority substituting its judgment for that of this Supreme Court in regard to the continued viability of *Lennane*, should be reversed and remanded back to the Court of Appeals with explicit instructions to apply *Lennane's* holding to the facts of this case.

II. THE CITY IS INCORRECT WHEN IT CLAIMS *LENNANE* IS INCONSISTENT WITH OTHER SUPREME COURT DECISIONS CONCERNING THE RELATIONSHIP BETWEEN STATE AND MUNICIPAL POWER.

In nearly every section of its brief, the City of Lansing embarks on a series of case discussions aimed at demonstrating the Supreme Court in *Lennane* misunderstood prior cases describing municipal power, that the justices on the Court at the time were results-driven, free-market ideologues, and that the Court hence irrationally and unconstitutionally infringed on Detroit's municipal power to regulate private third party contractors. For the most part, the

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discussion is much ado about nothing. More importantly, an examination of the cases cited by Lansing shows them to be entirely consistent with *Lennane*. Indeed, *Lennane* fits comfortably with all Supreme Court cases reported both before and after *Lennane* analyzing the relationship between state concerns and municipal concerns under Michigan's constitutions and under the Home Rule City Act, *MCL* § 117.1 *et seq.* ("HRCA").

The crux of the *Lennane* decision is the Court's elucidation that municipalities really have two different functions and, therefore, two different forms of power.[1] The first is the power recognized from time immemorial to manage matters unique to their own affairs, such as those associated with proprietary concerns of local assets and functions (buildings, parks, appointment of officers, etc.). The second is the authority to wield the state's police power as an arm or agent of the state. The Court identified public health and policing as examples. As the written grant of this agency power, the Court referenced the provisions of the 1908 Constitution and HRCA, both of which recognized the authority of cities to "pass all laws and ordinances relating to [their] municipal concerns, subject to the Constitution and general laws of this State." *Id.* at 637-638. It is within this second grant of power – as an arm of the state – where the Supreme Court in *Lennane* analyzed the purported authority of the City of Detroit to set wage and benefit mandates on third parties contracting to do work for the city. After reviewing prior cases finding public utility ratemaking and zoning to be matters of state concern only,[2] the Court concluded that setting wage and benefit rates of private parties was also a matter of state concern (a.k.a., state public policy) and that it was not a power to be shared with local governments. *Id.* at 638-641.

[1] In the words of the Court, it is a "dual function." ("That the municipality performs dual functions, some local in character, the others as agent of the State, will be presently considered; …"). *Id.* at 636.

[2] Ratemaking power still resides exclusively with the state, except as to utilities owned by a municipality. *MCL* § 460.6(1). Zoning power was subsequently extended to local governments by state statute. See, *Clements v. McCabe,* 210 Mich 207; 177 NW 72 (1920)).

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The City of Lansing contends that the Supreme Court's analysis in *Lennane* is somehow different from the analysis of other Supreme Court decisions involving lawmaking power as it coexists between the state and local units of government. First, Lansing believes the Supreme Court in *Lennane* made an unnecessary assumption concerning the broad scope of municipal power. Second, Lansing seems to believe *Lennane's* analysis of a municipality's "dual purposes" (its role as a proprietor and its role as an arm of the state) is at odds with all other Supreme Court precedent. The City is wrong on both counts.

Lansing begins with a historical overview of cases from the Supreme Court pre-*Lennane* offered to show that the *Lennane* Court should not have inserted immediately before its holding the phrase "[i]f we assume, as we have, for the purposes of the case, without deciding, the question that the city possesses such of the police power of the state as may be necessary to permit it to legislate upon matters of municipal concern … ." According to Lansing, this statement of the Court demonstrated a fundamental misunderstanding of precedent concerning municipal authority. Specifically, at page 10 of its brief, Lansing states that justices of the Court in the 20 years before *Lennane* would have been surprised "there was a need to 'assume without deciding' the authority of municipalities to legislate on matters of municipal concern."

But is Lansing accurate in its assessment of what the *Lennane* Court was saying? No. Moreover, does it really matter in the resolution to ABC's case against the City of Lansing now? Again, the answer is no. Contrary to how the City has portrayed the *Lennane* decision, the Court in *Lennane* did *not* state that it *"needed"* to assume anything without deciding. It simply stated that it *would* assume municipal governments have authority as an arm of the state to extend such power to matters regarding their own municipal concerns. The import of the statement immediately before its holding simply demonstrates that the Court, for purposes of its analysis,

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was giving Detroit the benefit of any possible doubt about the substantial level of municipal power the city enjoyed in that case as an arm of the state.

More importantly, the *Lennane* Court made it crystal clear within its opinion that it understood cities enjoy substantial power to legislate over their own municipal matters, particularly in regard to their own proprietary concerns, but also as an agent of the state. Indeed, the Court went to great pains to acknowledge that municipal governments wield substantial power in regard to matters affecting their local concerns, so much so that the state may not interfere with that power. Indeed, the Court in *Lennane* specifically held at 636, the following: "… this court from the beginning has vigilantly sustained the right of local self-government" and "[a]ttempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by this court." At the same time, the Court understood that the state maintains its separate zone of authority to regulate matters of state concern which, conversely, may not be infringed upon by local units of government. As the court poignantly summed up in this regard, "[n]either may trench upon the power possessed by the other alone." *Id.*

In regard to Lansing's confusion over *Lennane's* analysis of the dual purposes each city possesses, there is nothing inconsistent between *Lennane's* reasoning or decision and the reasoning or decisions of prior Supreme Court cases cited by Lansing. They all recognize that local governments have proprietary concerns which are off limits to the state, but also that they may legislate as an arm of the state only so long as the matter is truly a municipal concern and not one which properly resides in the state alone. In the first case cited, *People ex rel Le Roy v. Hurlbut,* 24 Mich 44 (1871), the City points out that Chief Justice Campbell identified municipal authority to be an "ancient" right which existed before Michigan ever adopted a constitution and that the Constitution of 1850 signaled a recognition of decreased power of the state to interfere

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with local management of local concerns. Likewise, Justice Cooley opined in *Hurlbut* that local self-government is not a mere privilege which the state might revoke at its pleasure. Yet, *Lennane* is entirely consistent with these precepts, having stated at 636, "… this court from the beginning has vigilantly sustained the right of local self-government" and "[a]ttempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by this court.". Indeed, in *Lennane*, the Court even went so far as to reference the case of *Davidson v. Hine,* 151 Mich 294 (1908) where the state legislature had sought to regulate not only state concerns (public safety), but also local government concerns (appointment of Bay City police and fire commissioners) within in the same statute. At page 641, the *Lennane* Court cited with obvious approval the *Davidson* Court's decision to strike the entire statute due to the state's attempted interference with local government appointments.

Lennane is also consistent with the other cases relied on by Lansing at pages 12-19 of its brief. Those cases merely show local governments possessing substantial power to regulate their own proprietary concerns. In *Village of Jonesville v. S Michigan Tel Co,* 155 Mich 86; 118 NW 736 (1908), the Court ruled a telephone company must abide by the telephone pole placement restrictions established by a city under its general municipal powers conferred by the state. Obviously, the Court had little difficulty recognizing the right of a city to manage the placement of telephone poles on its streets. This is the kind of municipal power referenced in *Lennane* as management of proprietary matters of a city. In *Churchill v. Common Council of City of Detroit,* 153 Mich 93 (1908), the Court found the City of Detroit had the power to manage where saloons could be built within the city limits. Again, proprietary power as acknowledged by *Lennane*.[3]

[3] Interestingly, it would appear there was also a state statute at the time specifically authorizing cities to regulate the location of saloons within their borders. See, *Johnson v. Common Council of the City of Bessemer,* 143 Mich 313, Fn. 1, (1906).

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Similarly, in *City of Detroit v. Detroit United Ry,* 172 Mich 136 (1912), aff'd 229 US 39 (1913), the Court ruled a city may require a railroad company to remove its tracks within the city limits at the time the company's lease expired. Again, these are examples of proprietary power referenced by *Lennane*.

Lansing provides several pages of treatment to the case of *Simpson v. Gage (sic),* actually *Simpson v. Paddock*, 195 Mich 581 (1917), but it is not entirely clear why. The case is no different than the prior cases cited by Lansing – it merely acknowledges that local units of government maintain exclusive power to regulate their own local, proprietary affairs. In that case, the state legislature passed a law requiring all cities in Michigan to provide their firefighters with a particular type of paid leave of absence. The City of Saginaw did not budget for the cost the compulsory benefit and refused to comply. The Court struck the statute down as having improperly interfered in local government matters. It held the leave benefits of city firefighters constituted a matter of purely local concern. This of course, is eminently consistent with *Lennane*. Again, as the Court stated at 636, "… this court from the beginning has vigilantly sustained the right of local self-government" and "[a]ttempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by this court." Further, the result in *Lennane* tracks in an extraordinarily consistent fashion with *Simpson* as the *Lennane* Court, immediately after striking Detroit's attempt to regulate private third party wages, referenced at page 641 the previous holding in *Davidson, supra,* where that Court invalidated an entire statute because the state attempted to manage local fire departments.[4] Thus, contrary to Lansing's hyperbole at page 20 of its brief, *Simpson* and *Lennane* are entirely compatible. Both

[4] In fact, *Simpson* also relied on *Davidson,* citing to it and other cases at page 586 as follows: "It may be first noted as well settled that a city's fire department is distinctly a matter which concerns the inhabitants of the city as an organized community apart from the people of the State at large, peculiarly within the field of municipal activity and local self-government."

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recognized the right of the state to legislate in matters of public health, welfare, and economy, but that such regulation could not interfere with the right of cities to manage their own affairs.

What ***is*** significant about *Lennane* in relation to *Simpson* is that the *Lennane* Court was faced with a different issue than the *Simpson* Court. *Simpson* dealt with the power of the state to regulate fringe benefits of Saginaw's own city firefighters. *Lennane* dealt with the power of the City of Detroit to regulate wages and benefits of private, third party employees of contractors. Those differences don't call into question the view of the judges on *both* courts who *all* agreed that cities have the power to regulate their *own* employee fringe benefit plans without state interference, but they do demonstrate why *Lennane* stands for a different proposition than *Simpson*. Since *Lennane* was called upon to determine whether municipal regulation of private wages and benefits infringed upon a state concern, its decision that such regulation did infringe on a state concern cannot be viewed as at odds with *Simpson* because local infringement on state concerns was not at issue in *Simpson*. Ultimately, the City has not shown that *Lennane* was incorrectly decided. [5]

III. THE CITY'S ARGUMENT THAT *LENNANE* SHOULD BE OVERRULED AS HAVING BEEN WRONGLY DECIDED IN THE FIRST INSTANCE IS A CONTENTION NOT SUPPORTED IN LAW OR REASON.

Beyond its futile attempt to show *Lennane* as an "outlier" in Michigan jurisprudence, the City of Lansing tries to show through the remainder of its brief that the *Lennane* Court got it

[5] Later in its brief, Lansing asserts *Lennane* relied on faulty precedent. At page 31, it points specifically to the apparently faulty reasoning of the Court in *Kalamazoo v. Titus,* 208 Mich 252; 175 NW 480 (1919), for "questioning the basic authority of municipalities to act." What Lansing didn't point out was that the same justices on the *Kalamazoo* Court (Steere, Kuhn, Stone, Ostrander, Bird, Moore, and Brooke) also sat on the *Simpson* Court – the particular court which Lansing claims got it right in regard to the extent of municipal power. Fellows was on both courts, but did not sit for the *Simpson* case. Furthermore, *Kalamazoo* was cited to approvingly by our Supreme Court as recently as 2006. See, *City of Taylor v. Detroit Edison,* 745 Mich 109, 115; 715 NW2d 28 (2006).

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wrong in regard to its determination that regulation of private third party wages and benefits is an area of state concern – a power retained by the state for uniform state policy and not a power to be shared with the numerous municipal governments in Michigan. Lansing essentially contends that *Lennane's* ruling preventing cities from intervening in the wage and benefit rates of private parties eviscerates every municipality's ability to engage in any and all forms of economic regulation affecting their localities. The gist of that argument is preposterous.

Cities have always possessed the right of self-government and to regulate matters affecting their economy so long as the matter relates to a municipal concern. The economic regulation of local trades and occupations by cities is quite expansive. Local governments have long legislated on *local concerns* relative to advertising and signage, zoning, parking, business hours, and all manner of licensure to name a few. All that *Lennane* stands for is that local units of government may not add to their list the regulation of wages and benefits paid by private parties within their sphere of control. The Court in *Lennane* pronounced that over 90 years ago and the ruling has not caused any practical workability problems for any local unit of government in Michigan.[6] Only by reversing *Lennane* would problems arise. As discussed in ABC's brief, the convoluted wage and fringe benefit schemes each city might concoct applicable to any business located within, doing business with, or simply passing through a particular city are endless. Contrary to Lansing's laughable proposition, computer programs will not solve the administrative nightmare businesses in Michigan would face if *Lennane* is overruled and local units of government are henceforth allowed to tinker with the employment relationship

[6] While it is true a handful of municipalities have passed prevailing wage and/or living wage ordinances in contradiction to *Lennane*, it is not as though they have gone unchallenged. In addition to the challenge brought in *Rudolph v. Guardian Protective Servs.*, 2009 Mich App LEXIS 1989 (2009) (unpublished) *Appendix at pp. 17A-19A,* which invalidated the City of Detroit's living wage ordinance, ABC previously demanded the City of Bay City repeal its prevailing wage ordinance or be sued. During suit, the City did legislatively repeal its ordinance. ABC then set its sights on Lansing's prevailing wage and living wage ordinance.

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employers and employees enjoy in Michigan subject to rules promulgated by the state.

Lansing also argues that the City of Detroit in *Lennane* was merely regulating local concerns because it did not extend its regulation to all businesses within its jurisdiction, but only to those which contracted for services with the city. It cites *Burton v. City of Detroit* 190 Mich 195; 156 NW 453 (1916) as support. But even a cursory review of that case shows a fatal distinction with the municipal regulation in *Lennane* and by Lansing currently. In *Burton*, the City of Detroit was regulating its own employees! Even Lansing's portrayal of the case at page 22 of its brief makes that perfectly clear; "[t]he city passed an ordinance to pay certain *city employees* ..." and "... this Court held the payment of *city employees* is a matter of local concern." (Emphasis added). Despite Lansing's claim that "[t]here is no meaningful difference between the authority of the municipality in *Burton* and the authority to require contractors with whom a municipality does business to pay its employees prevailing wages[,]" there actually is a world of difference! As *Lennane* (and all cases before and after it) recognizes, cities must have the ability to run their own proprietary concerns. They must possess the power to buy their own properties, to set the terms of their officials, to determine the makeup of their workforces, and to set the policies and compensation of their employees. The state has no legitimate interest in meddling with a local unit of government in those matters and when the state has meddled, the court has corrected it. See, *Davidson* and *Simpson, supra*. But the reverse is also true. Local governments cannot meddle in state concerns. *Kalamazoo, Clements,* and *Lennane, supra*. When it comes to the regulation of private employment relationships, the interest of the state is strong. It is a matter the state has regulated in many various ways for over a century.[7] For a city to infiltrate the employment relationship between private business owners and employees is for a

[7] Some examples are workers compensation, 1912 PA 10; unemployment compensation, 1936 PA 1; minimum wages 1964 PA 154; prevailing wages 1965 PA 166; payment of wages and fringe benefits, 1978 PA 390; non-competition, 1987 PA 243; sales commissions, 1992 PA 125.

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local unit of government to interfere with a state concern. In short, *Lennane* got it right.

Finally, Lansing also argues that its ordinance is justified because the City is essentially spending its own money and, therefore, it should be permitted to require private parties doing business with the city to increase their labor costs and charge those higher rates to the city which the taxpayers will ultimately bear. But this is just the City of Lansing using its ordinance as the proverbial camel's nose under the tent. If a city can regulate private party employment terms simply by virtue of a business having a commercial relationship with the city, what would prevent that city from embarking on the logical next step of regulating all employers receiving city services? It would seem just as logical for a city have a "municipal concern" in the pay and benefits of business receiving city services as those under the prevailing wage ordinance building a playground at a city park. Further still, what would prevent a city from possessing a municipal concern in the wages and benefits provided to businesses with investments in the city? If a city like Lansing can turn a state concern like private party wages and benefits into a municipal concern simply by showing some economic nexus between the city and the person(s) being regulated, then there would be virtually no regulation outside a city's power. This, of course, is not and cannot be the state of the law in Michigan. *City of Taylor, supra,* at 115, citing *Kalamazoo, supra.*

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